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Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,
v.
STATE OF HAWAI'I, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

American Jewish Committee ("**AJC**") is a non-profit international advocacy organization that was established in 1906 with the purpose of protecting the civil and religious rights of American Jews.[1] It has approximately 170,000 members and supporters, and maintains 26 regional offices in major cities nationwide. AJC has participated as *Amicus Curiae* in numerous cases throughout the last century in support of its mission.

For centuries, Jews have been immigrants and refugees seeking asylum from tyranny and oppression. Even in the face of atrocities such as the Holocaust and Jewish pogroms in Russia, Jews have often faced significant resistance to their resettlement. AJC was founded by American Jews concerned about these very issues. Building on its history, AJC continues to zealously advocate for an inclusive America that provides a safe haven for refugees fleeing from persecution.

Consistent with AJC's position that a strong, united America is vital to securing global freedom and

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[1] According to Supreme Court Rule 37.6, *Amicus Curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. Out of an abundance of caution, *Amicus Curiae* notes that other attorneys with the undersigned counsel's law firm are counsel to the International Refugee Assistance Project ("**IRAP**") and have conducted limited background research on a *pro bono* basis for IRAP in this matter, but were not directly involved in filing the underlying district court proceedings. Stephen A. Cobb of Linklaters LLP also contributed to the preparation of this brief. The parties have consented to the filing of this brief.

security, AJC promotes fair and just immigration policy. AJC historically has lobbied against rigid immigration quotas based on national origin, and instead has emphasized the importance of rules that are sufficiently flexible to accommodate pressing immigration needs.

As discussed further below, AJC has advocated for the careful and considered extension of protection to groups in need, including by welcoming oppressed peoples to the United States. Over the years, AJC has worked with a variety of stakeholders, including leaders of Latino communities, other religious and community leaders, entrepreneurs, and students, to promote comprehensive immigration reform. Further, AJC has consistently advocated against actions based on prejudice that are inconsistent with these values.

Today, AJC is a champion for the civil rights of people of all national origins, races, and religions, and it seeks equality, uniformity, and consistency in policies affecting all minorities. The rights of Jews and other religious minorities will be secure only when the rights of all Americans of all nationalities and faiths are equally secure. A statement made by Dr. Martin Luther King, Jr., to AJC leaders over 45 years ago still rings true today: "Jews cannot ensure equality for themselves until and unless it is ensured for all." For these reasons and those that follow, AJC cannot support the Second Executive Order.

SUMMARY OF THE ARGUMENT

While the President enjoys broad authority in the field of immigration, these powers are not absolute. To survive constitutional scrutiny, at a minimum the Government must show a reason for the challenged

action that is both "facially legitimate and bona fide." Here, it can do neither.

Although national security is the stated purpose of the Second Executive Order,[2] the Order does nothing to address the legitimate security threats facing the Nation. Unlike prior U.S. immigration policies, which demonstrate legitimate and bona fide reasons to apply preferences among certain immigrant groups, there is simply no factual basis here for such an unprecedented abdication of traditional American values.

The statements by the President and others in the Administration reveal that the Order is nothing more than the fulfillment of anti-Muslim campaign promises and a reflection of recent discriminatory rhetoric. The Order is therefore not rationally related to its stated purpose, nor based on any "facially legitimate and bona fide" reason. Because the disparaging rhetoric surrounding the Order is more than sufficient to make an "affirmative showing of bad faith," the Court should "look behind" the Order to assess its constitutionality.

Judicial scrutiny is especially appropriate where, as here, the President's actions are incompatible with the expressed will of Congress. Under the tripartite *Youngstown* framework, the President's power is at its lowest ebb when Congress's express or implied will

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[2] The President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (the "**Second Executive Order**," or the "**Order**"), after revoking Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (the "**First Executive Order**"). In relevant part, § 2(c) of the Second Executive Order provides for the temporary suspension of entry into the United States of alien nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "**Designated Countries**").

is incompatible with Presidential action. Here, the Second Executive Order is inconsistent with specific provisions of the U.S. Immigration and Nationality Act, as well as obligations arising under international instruments that Congress has chosen to ratify. For the reasons stated here, and those in Respondents' briefs, AJC respectfully urges the Court to affirm the judgments below.

ARGUMENT

I. THE ORDER DOES NOT ADVANCE ANY FACIALLY LEGITIMATE OR BONA FIDE GOVERNMENT INTEREST.

To survive a constitutional challenge, as discussed below in Part C, at a minimum, the Government must show a "facially legitimate and bona fide reason" to suspend entry of aliens abroad from the six Designated Countries. This showing, as the Fourth Circuit correctly recognized below, entails two "separate and quite distinct requirements." *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 590 (4th Cir. 2017).

To be "facially legitimate," there must be a valid reason for the challenged action stated on its face. *Id.* For the stated reason to be "bona fide," on the other hand, the Government must have acted in good faith. *Id.* Here, the stated purpose for the Order is neither facially legitimate nor bona fide. Unlike the prior U.S. immigration policies discussed below, the Second Executive Order does nothing to advance any legitimate government interest.

Further, there is abundant evidence that the stated justification for the Order is merely pretext for what is in fact fulfillment of anti-Muslim campaign rhetoric. As the statements of the President and

others in the Administration reveal, the modifications to the Second Executive Order amount to nothing more than transparent "window dressing," intended to obscure the Order's discriminatory motivation.

A. The Order Is Not Designed to Address a Genuine Threat to National Security or Other Legitimate Government Interest.

As AJC has previously stated, the Second Executive Order "[does] not effectively address the legitimate security threats we face."[3] Yet worse than being ineffective, the Order is counterproductive with respect to its stated purpose of promoting U.S. national security. Now, with little more than the cursory invocation of "national security" to ward off judicial scrutiny, the Order seeks to abandon the protection carefully extended to minorities, the oppressed, and others in danger that has long been a guiding principle and hallmark of U.S. foreign policy.

In an attempt to shield the Second Executive Order from the scrutiny that met its prior iteration, the Order invokes only two specific cases of terrorism-related offenses committed by refugees, one of which does not even involve a Designated Country: (1) two Iraqi refugees who were convicted of terrorism-related offenses in 2013; and (2) a Somali refugee who was convicted of an attempted terrorism offense in 2014. *See* Order, § 1(h).

Beyond that, the Second Executive Order relies entirely on the more general (and factually dubious) assertions that "[s]ince 2001, hundreds of persons born abroad have been convicted of terrorism-related

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[3] *See* AJC, *AJC Statement on Revised Executive Order* (Mar. 6, 2017), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=14987411.

crimes in the United States," and that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations" by the Federal Bureau of Investigation ("**FBI**"). *Id.* The Government provides no evidence or authority to support these assertions. *Id.* This failure demonstrates the Government's true purpose in issuing the Order. The Government's reliance on such vague evidence, and its focus on countries from which no terrorist attacks against the United States have originated, show that the stated purpose of the Second Executive Order is merely pretext.

The cited examples only highlight the disconnect between the stated purpose of the Order and its discriminatory intent. The Order identifies two Iraqi nationals as among the primary examples of the purported threat posed by refugees, yet Iraq is no longer subject to a travel ban under the Second Executive Order.

And while Somalia remains on the list of Designated Countries, the Somali refugee cited in the Order arrived in the United States as a three-year-old child in 1994, and the conduct underlying his conviction did not occur until 2010, when he was 19 years old. *See United States* v. *Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). No degree of vetting before entry could have identified the risk posed by a person who became radicalized only after living in the United States for well over a decade.

Indeed, as the Ninth Circuit explained, this Somali refugee's background is consistent with a report authored by the Department of Homeland Security ("**DHS**"), which found that "most foreign-born, U.S.-based violent extremists are 'likely radicalized several years *after* their entry to the United States,' thus

'limiting the ability of screening and vetting officials to prevent their entry because of national security concerns.'" *Hawai'i* v. *Trump*, 859 F.3d 741, 775 n.16 (9th Cir. 2017).

Such limited evidence fails to show that the United States would be safer with an order excluding all nationals of six Muslim-majority nations from entering the United States. Even if the Court were to accept the Government's general statistics on foreign-born crime rates and individuals under FBI investigation (which, as former national security officials have suggested,[4] are not probative absent a definition of "terrorism-related crime"), these statistics provide no rational basis for the Order—an order supposedly intended to address terrorism concerns.

Neither the Second Executive Order, nor any other evidence, explains whether the "hundreds of persons" purportedly convicted for terrorism-related offenses were nationals of the Designated Countries, and Government officials have refused to disclose such information. Given that the Administration drafted the Second Executive Order specifically to survive judicial scrutiny, the absence of factual support is fatal to the Government's claim that the Order is responsive to any genuine threat to national security. *See* Order Granting TRO at 39, *Hawai'i* v. *Trump*, No.

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[4] *See* Corrected Br. of Former Nat'l Sec. Officials as *Amici Curiae* at 7, *Int'l Refugee Assistance Project* v. *Trump*, No. 17-1351 (4th Cir. Apr. 13, 2017), ECF No. 126-1 ("**Nat'l Sec. Br.**") ("The Order does not actually cite any support for this statement. But a similar set of data—relied on by White House officials in recent weeks to justify the initial January 27 Order—has been widely criticized for its definition of terrorism-related offenses, among other issues." (citation omitted)).

17-00050 DKW-KSC (D. Haw. Mar. 15, 2017) ("The Court's conclusion rests on . . . the dearth of evidence indicating a national security purpose." (citation omitted)).

Indeed, as former senior national security officials from across the political spectrum have unequivocally stated, "There is no national security or foreign policy basis for suspending entry of aliens from the six named countries." Nat'l Sec. Br. at 5-8.[5] In fact, "not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years," and "multiple studies show that the overwhelming majority of individuals who were charged with—or who died in the course of committing—terrorist-related crimes inside the United States since September 11 have been U.S. citizens or legal permanent residents." *Id.* at 6 (citations omitted). As these officials conclude, "***No legitimate national security purpose*** is served by the Order's blanket ban on entry into the United

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[5] In the Ninth Circuit, ten former national security, foreign policy, and intelligence officials in the U.S. Government filed a joint declaration in opposition to the First Executive Order. *See* States' Resp. to Emer. Mot., Ex. A ("**Nat'l Sec. Resp. Decl.**") ¶ 4, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 28-2. In the Fourth Circuit, joined by a number of their colleagues, these officials further expanded on their professional judgments as *amici curiae* in the cited brief. These officials, who worked at senior levels in administrations from across the political spectrum, came together in opposition to the challenged action. A number of *amici* were current on active intelligence concerning all credible terrorist threat streams as of January 20, 2017, and have indicated that no specific threat of which they were aware would have justified the ban on travel from the Designated Countries. *See* Nat'l Sec. Br. at 9.

States of nationals of Syria, Sudan, Iran, Somalia, Libya, and Yemen." *Id.* at 5 (emphasis added).

Likewise, as the Fourth Circuit observed, "The Government's argument that EO-2's primary purpose is related to national security is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies, and that those agencies only offered a national security rationale after EO-1 was enjoined." 857 F.3d at 596 (citations omitted).

Homegrown terrorism remains a more credible and prevalent threat to the United States than foreign terrorism. In fact, in the Administration's first few weeks, even DHS noted that a person's "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." DHS, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* (photo. reprint Feb. 2017) (n.d.).[6] Of the 82 terrorism-related offenses in the United States since March 2011, more than half of the perpetrators were native-born U.S. citizens, while foreign-born perpetrators were from 26 different countries. *Id.* The seven countries with the highest number of perpetrators were: Pakistan (5); Somalia (3); and Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan (each with 2)—a list very different from the Designated Countries of either the First or Second Executive Orders. *Id.*

The fact that in the past six years only one foreign-born individual from each of Iran, Sudan, and Yemen,

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[6] *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, Lawfare (Feb. 27, 2017), www.lawfareblog.com/leaked-dhs-report-contradicts-white-house-claims-travel-ban.

and none from Syria, have engaged in terrorism-related offenses in the United States undermines any claim that excluding foreign nationals from the Designated Countries is rationally related to national security concerns. Nowhere does the Government explain how barring vulnerable groups of refugees, including the elderly and young children, will make the United States more secure. Although the Order allows for the "case by case" admission of some vulnerable individuals, members of these groups can, and inevitably will, still be excluded.

Rather than protecting the United States, the Second Executive Order is fundamentally detrimental to U.S. national security interests. As national security and intelligence officials stated in their joint declaration, the Order has the perverse potential to: "endanger U.S. troops" and intelligence sources; "disrupt essential counterterrorism, foreign policy, and national security partnerships"; feed into the narrative of ISIS propaganda,[7] which portrays the United States as at war with Islam; "disrupt ongoing law enforcement efforts"; harm victims of terrorism; and result in negative economic consequences for the American people. Nat'l Sec. Br. at 17-22; Nat'l Sec. Resp. Decl. at 3-4. Further, excluding immigrants and refugees in these circumstances will irreparably damage the image of the United States around the world, harming our relationships with other countries and making it more difficult to pursue legitimate interests through diplomacy.

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[7] ISIS is also known as ISIL, or the Islamic State of Iraq and the Levant, the Islamic State in Iraq and Syria, or the Islamic State of Iraq and al-Sham.

If, as the Administration claims, a genuine threat to national security exists and its details cannot be publicly disclosed, avenues remain available to disclose this information to the Court. The Government, for example, can present evidence to the Court *in camera* without publicly disclosing sensitive national security information. That it has not done so speaks volumes. Despite public criticism and courts' consternation over the lack of evidence, the Government failed to provide factual support. This can mean only one thing: the stated national security rationale is nothing more than "window dressing."

As the U.S. District Court for the District of Maryland correctly observed, the Government has not "shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." Mem. Op. at 40, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-00361-TDC (D. Md. Mar. 16, 2017). In the months since the Order was enjoined, the Government still has not presented admissible evidence that U.S. national security was harmed. Nor can the Government rely on the President's assertions on social media of a national security purpose. There is simply no factual basis to sustain the Government's national security claim.

B. In Contrast to the Second Executive Order, Prior U.S. Immigration Policies That Gave Preference to Certain Groups Were Rationally Related to a Legitimate and Bona Fide Government Purpose.

Traditional U.S. foreign policy interests, from diplomatic signaling to protecting human rights, can serve as legitimate justification for shaping U.S.

immigration policy. Granting preferential treatment to certain immigrant groups in response to foreign policy concerns, however, requires issuing carefully tailored policies implemented for legitimate and bona fide reasons and supported by factual evidence.

In stark contrast to the Second Executive Order, prior U.S. immigration laws and policies have favored extending protections in the United States to specific groups of immigrants and refugees in need. As these policies demonstrate, legitimate and bona fide reasons have supported the preferences that were previously given to certain immigrant groups. Consistent with U.S. foreign policy concerns and the founding principles of human dignity, self-determination, and religious freedom that are central to American democracy, the Executive and Legislative branches have frequently exercised their authority over immigration affairs to protect refugees and other oppressed peoples. While the Government thus has some measure of authority to set immigration policy on the basis of religion or ethnicity, ultimately any such policy must rationally relate to a legitimate government interest. Unlike the Second Executive Order, each immigration policy discussed below is rationally related to its stated purpose, and further demonstrates that the Order fails to satisfy this test.

Historically, the United States has welcomed groups of persecuted refugees. After the Vietnam War, for example, the United States endeavored to repay its moral debt by offering sanctuary to approximately 111,000 Vietnamese refugees escaping economic hardship and the threat of "re-education" camps. The next year, that number almost doubled to 207,000 refugees. Around the same time, during the Mariel boatlift, the United States accepted over 120,000

Cuban refugees that were fleeing persecution by the Castro regime, including more than 80,000 in one month alone.[8] More recently, in 1999, the United States agreed to accept 20,000 refugees from Kosovo.[9]

The Executive branch has often established rational policies designed to assist groups in need, including through the use of Presidential Determinations on Refugee Admissions, which can increase admissions and funding for refugees in response to humanitarian needs.[10] Yet another example is President George

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[8] *See* Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times (Sept. 10, 2015), www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html?_r=1.

[9] *See* Adam Taylor, *That Time the United States Happily Airlifted Thousands of Muslim Refugees Out of Europe*, Wash. Post (Nov. 17, 2015), www.washingtonpost.com/news/worldviews/wp/2015/11/17/that-time-the-united-states-happily-airlifted-thousands-of-muslim-refugees-out-of-europe/?utm_term=.7cd5cd88608d.

[10] A Presidential Determination is a formal policy document issued by the White House, stating the position of the Executive branch on a particular issue, such as the adoption of a new foreign policy. Many of these have directly addressed refugee admissions. *See, e.g.*, Presidential Determination No. 2016-13, 81 Fed. Reg. 70,315 (Sept. 28, 2016) (permitting admission of up to 110,000 refugees to the United States in 2017, allocated on the basis of special humanitarian concern and geographic regions, and specifically providing that individuals in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, and El Salvador could be considered refugees); Presidential Determination No. 99-23, 64 Fed. Reg. 28,085 (May 18, 1999) (allowing 20,000 Kosovar refugees to be admitted and providing $15 million in funds for relief); Presidential Determination No. 80-11, 45 Fed. Reg. 8539 (Jan. 28, 1980) (determining that Afghan refugees were eligible for assistance, and contributing monetary resources to their relief, in response to "urgent humanitarian needs").

H.W. Bush's Executive Order 12,711, "Policy Implementation with Respect to Nationals of the People's Republic of China," which deferred deporting Chinese nationals for four years in response to the Tiananmen Square incident. *See* 55 Fed. Reg. 13,897 (Apr. 11, 1990). In each of these cases, the Executive branch crafted rational policies that were specifically tailored to assist a group in need.

Congress, too, has rationally enacted immigration legislation in favor of specific groups to extend the protection of the United States to oppressed communities. The Lautenberg Amendment is one particularly noteworthy example. The Amendment, originally enacted with the 1990 Foreign Appropriations Bill, classified Soviet Jews and certain other religious communities as persecuted groups, automatically qualifying them for refugee status. Senator Lautenberg's initiative facilitated entry into the United States for Soviet refugees just before the collapse of the Soviet Union.[11] More generally, Congress has codified certain beneficial preferences among classes of aliens into U.S. immigration laws.[12]

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[11] *See* AJC, *AJC Mourns Passing of Senator Lautenberg*, Press Release (June 3, 2013), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=13164165.

[12] For example, under the U.S. Immigration and Nationality Act (the "INA"), certain classes of aliens are given priority and preference with respect to visas or immigrant status. *See, e.g.*, 8 U.S.C. § 1153(b)(1)(A) (providing preference for individuals of extraordinary ability); *id.* § 1101(a)(27)(c) (conferring special immigration status on certain individuals seeking to enter the United States to work in a religious vocation or organization). Likewise, the Executive branch may propose, subject to congressional approval, yearly ceilings on refugee admissions by world region. *See id.* § 1157.

Unlike the Second Executive Order, none of the examples above was motivated by religious discriminatory animus or the mere execution of baseless campaign promises to exclude certain groups of people. [13] Instead, these prior policies were deliberately designed and tailored to achieve particular justified results, and they demonstrate how the Executive and Legislative branches have rationally used their immigration and foreign affairs authorities to advance the legitimate government purpose of protecting refugees and other oppressed peoples. These examples reflect careful consideration of U.S. foreign policy, including critical supporting facts, and respect for essential human dignity—they are precisely the kinds of immigration policies that AJC has championed throughout its history.

Accepting immigrants and refugees in times of need has long been a core tenet of the fundamental values and national identity of the United States. True to its character, this Nation frequently has opened its gates, offering safe haven and freedom for those without. Immigration has proved to confer enormous benefits on U.S. foreign policy, national security, and the economy. As demonstrated by the immigration policies discussed above, U.S. history is replete with examples of facially legitimate and bona fide reasons for Congress and the President to exercise their

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[13] Exclusionary policies can be rationally related to legitimate government purposes. *See, e.g.*, *Narenji* v. *Civiletti*, 617 F.2d 745, 747-48 (D.C. Cir. 1979) (holding that an affidavit from the Attorney General cited sufficient legitimate foreign-affairs concerns—the Iranian seizure of the American embassy—to draw rational distinctions based on nationality). Unlike *Narenji*, the Government has failed to offer evidence of a link between a specific foreign affairs crisis and the Second Executive Order. Rather, the Order risks repeating *Korematsu*. *See* section I.C.

immigration powers by discriminating on the basis of religion or ethnicity. Inclusive policies that grant preferential treatment have achieved U.S. foreign policy aims and strengthened the Nation, while reinforcing fundamental values and saving thousands of lives. In contrast to the stark lack of rational support offered for the Order here, these historical examples further demonstrate why the Second Executive Order cannot withstand constitutional scrutiny.

C. Statements of the President and Others in The Administration Demonstrate That the Second Executive Order Fulfills Anti-Muslim Campaign Promises and Reflects Disparaging and Discriminatory Rhetoric.

Any possible legitimate justification for the Order is contradicted by blatant, recurring anti-Muslim rhetoric. The Second Executive Order was not issued in a vacuum. As the Fourth Circuit explained, "The First and Second Executive Orders were issued against a backdrop of public statements by the President and his advisors and representatives at different points in time, both before and after the election and President Trump's assumption of office." *Int'l Refugee Assistance Project*, 857 F.3d at 575. These statements provide ample evidence that national security is not the true purpose of the Second Executive Order. The public record contains myriad examples of such unfounded antireligious and discriminatory rhetoric—we recount but a few.

To start, President Trump himself has called the Second Executive Order a "watered-down version" of the original order, adding, "I think we ought to go back

to the first one and go all the way." [14] And significantly, the day after signing the First Executive Order, President Trump's campaign supporter and advisor, Rudolph Giuliani, explained on television how that order came to be. He said, "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[15]

The desire to enact a "Muslim ban" reflected a longstanding campaign promise by President Trump. Indeed, until May 8, 2017, his campaign website referenced "preventing Muslim immigration," and "a total and complete shutdown of Muslims entering the United States."[16] On January 30, 2017, he tweeted, "If the ban were announced with a one week notice, the 'bad' would rush into our country during that week."[17] Even more directly, on March 9, 2016, then-

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[14] *See* Matt Zapotosky, Kalani Takase & Maria Sacchetti, *Federal Judge in Hawaii Freezes President Trump's New Entry Ban*, Wash. Post (Mar. 16, 2017), www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-Wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.cf7d2d96 44f9.

[15] *See* Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—and Ordered a Commission to Do It 'Legally'*, Wash. Post (Jan. 29, 2017), www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_te m=.bd62c88 d1c64.

[16] *See* Zack Ford, *White House Scrubs Campaign Website to Hide Trump's Past Muslim Ban Comments*, ThinkProgress (May 8, 2017), thinkprogress.org/trump-scrubs-muslim-ban-cc0 27c54f8c2.

[17] *See* Clare Foran, *Trump's Flawed Defense of His Immigration Order*, The Atlantic (Jan. 31, 2017), www.theatl

candidate Trump explained, "I think Islam hates us. There's something there that—there's a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us." [18] On December 13, 2015, then-candidate Trump stated of Muslims, "There's a sickness. They're sick people. There's a sickness going on. There's a group of people that is very sick."[19] *See also Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d at 575-77 (collecting similar public statements by the President and his advisors).

These disparaging statements provide ample evidence that the Second Executive Order was not issued to achieve its stated national security purpose, but was instead intended to fulfill a discriminatory campaign promise of a "Muslim ban." AJC has long advocated against this type of blatant religious intolerance.

Indeed, permitting the Government to discriminate based on the unfounded assertion that a particular group poses a national security threat would return the Court to the widely discredited rationale that allowed the President to issue an executive order interring individuals of Japanese descent, including

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antic.com/politics/archive/2017/01/trump-immigration-ban-muslim-countries-syrian-refugees/515085/.

[18] *See* Jenna Johnson & Abigail Hauslohner, *'I think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, Wash. Post (May 20, 2017), www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.d544b1f8001a (collecting President Trump's statements regarding Islam and Muslims from 2011 to 2017).

[19] *See id.*

U.S. citizens, based solely on ethnic ancestry. *See Korematsu v. United States*, 323 U.S. 214 (1944).

This rationale has been repudiated by each of the Executive[20], Legislative,[21] and Judicial branches of Government, *see Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984), as a shameful relic of our history. In granting Fred Korematsu a writ of *coram nobis*, the U.S. District Court for the Northern District of California cautioned:

> As a legal precedent it is now recognized as having *very limited application*. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. *It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.* It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens

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[20] In 1976, President Gerald R. Ford issued Presidential Proclamation No. 4417. It terminated Executive Order No. 9066 (1942), which had authorized the Japanese-American internment during World War II. Proclamation No. 4417 made this termination retroactively effective December 31, 1946, when Proclamation No. 2714 was issued, announcing the end of World War II hostilities. *See* Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

[21] On August 10, 1988, President Ronald Reagan signed the Civil Liberties Act, authorizing compensation to over 100,000 individuals of Japanese descent who were interred during World War II. *See* 50 U.S.C. §§ 4211-4220.

> from the petty fears and prejudices that are so easily aroused. *Id.* (emphasis added).

An examination of the disparaging, anti-Muslim rhetoric animating the Second Executive Order is entirely appropriate under the precedents of this Court. While the Executive and Legislative branches enjoy broad authority to regulate matters of immigration, these powers are not absolute. *See Fiallo* v. *Bell*, 430 U.S. 787 (1977); *Reno* v. *Flores*, 507 U.S. 292 (1993); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

This Court has previously recognized a "limited judicial responsibility under the Constitution" to review Congressional actions concerning "the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793 n.5. More recently, the Court again emphasized that this plenary power, though broad, is still "subject to important constitutional limitations." *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001); *see also INS* v. *Chadha*, 462 U.S. 919, 941 (1983) (noting requirement that the political branches "cho[ose] a constitutionally permissible means of implementing" their authority over immigration). At a minimum, the Government must show that a challenged immigration action is "facially legitimate and bona fide." *Mandel*, 408 U.S. at 769. As the Fourth Circuit observed, these are "separate and quite distinct requirements." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 590.

Although the Executive and Legislative branches may craft immigration policies that differentiate among particular groups, they cannot act without a rational relationship to a legitimate government purpose. *See, e.g.*, *Flores*, 507 U.S. at 306 (noting that despite Congress' plenary power over immigration, "INS regulation must still . . . rationally advanc[e]

some legitimate government purpose"). For an action to be "facially legitimate," the Government need only show a valid reason for the action stated on its face. When a court finds that the Government has acted with the purpose and effect of engaging in actions that "disparage and . . . injure" a group of people—as the Government has done here—it is less likely that its stated policies are rationally related to a legitimate government purpose. *United States* v. *Windsor*, 133 S. Ct. 2675, 2696 (2013).

The "bona fide" requirement, on the other hand, is a requirement of good faith. Thus, when the plaintiff makes an "affirmative showing of bad faith," courts can "look behind" the Government's exclusion of a nonresident alien "for additional factual details beyond" its express reasoning.[22] *Kerry* v. *Din*, 135 S. Ct. 2128, 2131 (2015) (plurality opinion).[23] Courts may consider circumstantial evidence, including rhetoric, to determine whether a challenged action is based on animus, rather than a legitimate purpose.[24]

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[22] The courts considering the First Executive Order looked behind the Government's arguments to the "highly particular 'sequence of events' leading to this specific EO and the dearth of evidence indicating a national security purpose." *Aziz* v. *Trump*, No. 1:17-cv-116-LMB-TCB, 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017).

[23] As at least the Fourth and Ninth Circuits have recognized, Justice Kennedy's concurrence is the narrowest ground for the Court's holding in *Din*; thus, under the reasoning of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), Justice Kennedy's concurrence in *Din* is the controlling opinion. *See Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d at 590.

[24] *See, e.g.*, *Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (considering statements by decisionmakers in finding that the denial of a rezoning request was not motivated by a discriminatory purpose); *Church of the*

For the reasons explained above, the Second Executive Order is not rationally related to its stated purpose of ensuring national security, nor is it based on any "facially legitimate and bona fide" reason. Indeed, the failure to rely on appropriate or relevant evidence, as well as the focus on countries from which no terrorist attacks on the United States have originated, demonstrates that the Order fails the facial legitimacy test set forth in *Mandel*. Further, the disparaging anti-Muslim rhetoric undercuts any potentially legitimate and bona fide reason for the Order and is more than sufficient to make an "affirmative showing of bad faith." The Government's stated purpose is therefore no longer entitled to deference, and the Court should "look behind" the Order to assess its constitutionality.

II. REVIEW IS ESPECIALLY APPROPRIATE WHERE, AS HERE, THE PRESIDENT'S ACTIONS ARE INCOMPATIBLE WITH THE EXPRESSED WILL OF CONGRESS.

Finally, it must be noted that the more searching judicial review urged here is particularly appropriate where the President's actions are incompatible with the expressed will of Congress. Under the tripartite framework of *Youngstown*,[25] the President's power is

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Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (finding that the historical context of a local law against religious animal sacrifice was evidence that a law improperly targeted a specific religious group); *INS* v. *Pangilinan*, 486 U.S. 875, 886 (1988) (considering the historical record to determine whether U.S. Government actions in removing its naturalization officer from the Philippines were motivated by racial animus).

[25] Because the Government asserts national security as the nominal justification for the Second Executive Order, the context of *Youngstown* is significant. On the eve of a strike against certain steel companies, President Truman issued an executive

at its highest ebb when there is an express or implied delegation of authority from Congress; in a "zone of twilight" with concurrent authority when Congress is silent on or ambiguous about an issue; and "at its lowest ebb" when Congress's express or implied will is incompatible with Presidential action. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2084 (2015) (citing *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring)).

In this case, as the Ninth Circuit recognized, the President has taken measures that are "incompatible with the expressed will of Congress"; the President's authority is thus "at its lowest ebb," and subject to particular scrutiny. *See Hawai'i* v. *Trump*, 859 F.3d at 782. "In this zone, 'Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.'" *Id.* (quoting *Youngstown*, 343 U.S. at 638).

There is no question that the INA reflects the expressed will of Congress. The President's authority to issue the Second Executive Order is inconsistent with the INA, 8 U.S.C. § 1152(a)(1)(A), which states that "[e]xcept as specifically provided in paragraph (2) and in Sections 1101(a)(27), 1141(b)(2)(A)(i), and 1153

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order directing the Secretary of Commerce to seize and operate most of the Nation's steel mills. Given the importance of the steel supply to the Korean War effort, the President invoked national security to justify the seizure. Rejecting this argument, the Court found that there was no congressional statute that authorized this order, and that the President's military powers under the Constitution did not extend so far. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Thus, contrary to the Government's position here, the invocation of national security is not, nor has ever been, a blank check for Presidential authority.

of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." *See also id.* § 1157 (providing procedures for refugee admission into the United States); § 1182(a)(3)(B) (identifying criteria for determining terrorism-related inadmissibility). As discussed, absent legitimate and bona fide reasons for narrowly tailored policies granting preferential treatment of certain immigrant or refugee groups, such discrimination violates the INA.

These INA provisions were enacted to reject the shameful legacies of previous eras, in which immigration policy operated on a "national origins system" that explicitly sought to maintain a certain "ethnic composition of the American people." H. Rep. No. 89-745 (1965); S. Rep No. 89-748 (1965). AJC was a vital part of this movement to abolish the national origins system, [26] and has campaigned vigorously against discriminatory national origin quotas since then.

The Government claims here that the Executive Branch may discriminate in suspending entry of immigrants under the INA, 8 U.S.C. § 1182(f). This 1954 INA provision allows for Executive discretion, stating that if the "President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," the President may "suspend" such entry or impose "any restrictions he may deem to be

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[26] Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906-1966* (1972); Marianne R. Sanua, *Let US Prove Strong: The American Jewish Committee 1945-2006* (2007).

appropriate." *Id.* This claim, however, conflicts with the clear intent of Congress, as well as the text and structure of the statute.

The 1965 discrimination ban was passed 11 years after the 1954 provision for Executive discretion. Congress undoubtedly knew the contents of the INA when amending it, and would have intended for this amendment to apply to the INA as it existed at the time—including § 1182(f). This accords with traditional principles of statutory construction, under which a provision enacted later in time governs one enacted earlier. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Thus, § 1152(a)(1)(A) restricts § 1182(f)—not vice versa. Congress also carefully considered exceptions to this bar on discrimination, and specifically wrote them into the INA. Section 1182(f) is not one of these exceptions, and therefore does not apply here.

In the face of the INA, the Executive lacks the authority to issue the Second Executive Order because it is plainly incompatible with the INA. As the Ninth Circuit found below, the Second Executive Order violates the INA. *See Hawai'i* v. *Trump*, 859 F.3d at 782; *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 611, 613-14 (Thacker & Wynn, JJ., concurring).

Further, in *Medellín* v. *Texas*, 552 U.S. 491 (2008), the Supreme Court affirmed that *Youngstown* is the proper analytical framework for reviewing executive authority with respect to international obligations as well. In relevant part, *Medellín* makes clear that the President lacks the authority to unilaterally transform international obligations where Congress has taken no action (for example, by attempting to unilaterally execute a treaty). Under *Youngstown*,

the international obligations assumed by Congress further demonstrate that the President acts at the "lowest ebb" of his authority here.

In this case, the Refugee Act of 1980 is particularly germane, as its legislative history reflects an unambiguous congressional intent to accede to the Convention and Protocol Relating to the Status of Refugees. [27] Indeed, this Court has specifically recognized that the legislative history makes clear that "one of Congress' primary purposes was to bring United States refugee law into conformance with the [Refugee Convention]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1980). Again, by acting contrary to this clearly expressed will, the President's authority is reduced to its "lowest ebb."

Where Congress has ratified other international instruments, these agreements provide additional evidence that Congress's express or implied will is incompatible with the Order. *See, e.g.*, International Covenant on Civil and Political Rights [ratified June 8, 1992], art. 4 (providing that even in a "time of public emergency which threatens the life of the nation," states cannot take any action to stray from their obligations that involve discrimination "solely on the ground of race, colour, sex, language, religion or social origin"); *id.* art. 26 (requiring equal treatment before the law of all persons, without discrimination on any ground, including race, religion, or national or social origin); International Convention on the Elimination of All Forms of Racial Discrimination [ratified Oct. 21,

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[27] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); S. Rep. 96-590, at 19 (1980); *see also* Convention and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

1994] (requiring state parties to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law).

As these authorities further demonstrate, absent evidence of a legitimate and bona fide national security threat to the United States or U.S. foreign policy interest, the Second Executive Order is plainly incompatible with the expressed or implied will of Congress. Acting in this zone of authority, as the Ninth Circuit recognized below, the President's claim to such broad power goes to the very "equilibrium established by our constitutional system," *Hawai'i* v. *Trump*, 859 F.3d at 782, and the importance of careful scrutiny is paramount.

CONCLUSION

While the President enjoys broad authority to set immigration policy, that authority is necessarily constrained by the Constitution. Here, because the Second Executive Order remains unsupported by a facially legitimate or bona fide government purpose, it cannot survive even the most basic constitutional

scrutiny. For these reasons, and those in Respondents' briefs, the judgments below should thus be affirmed.

Respectfully submitted,

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